Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01476/2018**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 1 March 2019	**On 13 March 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS E N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: Mr H Dieu, Counsel, instructed by Legal Justice Solicitors

DECISION AND REASONS

1. In a decision sent on 5 November 2018, Judge Walker of the First-tier Tribunal (FtT) allowed the appeal of the respondent (hereafter the claimant) against the decision of the appellant (hereafter the Secretary of State or SSHD) made on 16 January 2018 refusing her protection claim. The claimant is a national of Afghanistan of Sikh origin. She had originally claimed asylum as a dependent of her husband. His application had been refused on 3 June 2015 and his appeal heard and dismissed on 5 March 2016, the judge being Judge Coaster. She had then applied for asylum in her own right on 18 February 2017, with her husband as a dependent.

2. The SSHD's grounds take aim at what the judge stated at paragraph 49:

> "There can be no such thing as **Devaseelan** in spirit as was suggested to me by the respondent because it is an essential element of that case that the protagonists in the case are the same. This appellant did not have representation or the opportunity to present her case in the appeal which came before IJ Coaster. Further I am satisfied by the comments made by Upper Tribunal Judge Finch that the appellant's husband's solicitors had not acted on his instructions and I also note the comments made by Upper Tribunal Judge Finch that there were elements of the appellant's husband's case which could have been put in front of IK Coaster but were not."

3. They contend that the judge's finding that **Devaseelan** principles have no application failed to adhere to the guidance given by the Court of Appeal in **AA (Somalia)** [2007] EWCA Civ 1040 regarding the treatment of family members where there is an overlapping of the factual matrix. In a Rule 24 Reply the claimant's representatives aver that the judge's treatment of **Devaseelan** principles was in fact consistent with the guidance given in **AA (Somalia)** wherein it was said that it was "the fundamental obligations of the judge independently to decide the second case on its own individual merits".

4. I am grateful for the excellent submissions I heard from both representatives.

5. The first sentence of paragraph 49 is poorly expressed. It is difficult at first sight to understand what the judge meant by the "spirit" of **Devaseelan**. (It is also unclear who the judge meant to refer to by use of the term "protagonist"; I assumed he meant the appellant, but Mr Mills suggested he meant the actors of persecution). Mr Mills very fairly disclosed that the note made by the Presenting Officer at the hearing recorded his submission that although **Devaseelan** could not be "literally" applied to the claimant's case, it could be applied "in spirit".

6. In any event, it is clear that the judge was wrong to hold that **Devaseelan** principles had no application. She was not helped perhaps by the submissions made by the Home Office Presenting Officer who, despite citing **AA (Somalia)** appears not to have understood the ratio of the majority decision. Nevertheless, it is settled law that **Devaseelan** principles can apply by extension even when the case concerns a different appellant so long as there is a significant factual overlap: see (**AA (Somalia)**).

7. Mr Dieu sought to submit that there was "not enough factual overlap" because in this appeal the claimant was the appellant and her husband merely a dependant and the factual matrix was very different, relying on the claimant's (his wife's) hitherto unmentioned difficulties at the hands of males of the local Muslim community. Mr Dieu's arguments certainly establish significant differences between the two asylum claims, but it

cannot fairly be said that these negated the very substantial points of overlap, both appeals involving the same husband and wife and the same claim to being Sikhs facing serious societal discrimination in the same area of Kabul. Mr Mills is clearly right, therefore, to say, that the judge should have applied **Devaseelan** principles.

8. However, for the above error to warrant my setting aside the decision, I would have to be satisfied it was material. Despite Mr Mill's very well-presented arguments, I am not persuaded that it was.

9. In the first place had the judge applied **Devaseelan** principles, she would have been aware that in cases such as the claimant's where its principles are applied by extension, there is a particular need to apply them using a "flexible approach" (see paragraph 62 of **AA (Somalia)**). Second, she would have had to bear in mind Carnwath LJ's observations at paragraphs 70, which indicate that in cases such as the claimant's there may be good reason to be "more readily persuaded" to revisit previous finidngs:

> "70. Secondly, in applying the guidelines to cases involving different claimants, there may be a valid distinction depending on whether the previous decision was in favour of or against the Secretary of State. The difference is that the Secretary of State was a direct part to the first decision, whereas the claimant was not. It is one thing to restrict a party from relitigating the same issue, but another to impose the same restriction on someone who, although involved in the previous case, perhaps as a witness, was not formally a party. This is particularly relevant to the tribunal's comments, in *Devaseelan*, on what might be "good reasons" for reopening the first decision. It suggested that such cases would be rare. It referred, for example, to the "increasing tendency" to blame representatives for unfavourable decisions by Adjudicators, commenting:
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> > "An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence …".
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> I understand the force of those comments where the second appeal is by the same claimant, but less so where it is by a different party, even if closely connected. Although I would not exclude the *Devaseelan* principles in such cases (for example, the hypothetical series of cases involving the same family, cited in *TK*), the second tribunal may be more readily persuaded that there is "good reason" to revisit the earlier decision."

10. Second, on the judge's findings, not challenged in the SSHD's grounds, this was a case in which there were good reasons why the fresh claim had been advanced on a different basis, notwithstanding that at first sight all that was involved was a swapping of roles as appellant and dependent by the husband and wife. At paragraph 50 the judge found:

> "The appellant did not respond appropriately to the One Stop notice which was served on her. However, I accept her explanation that she had relied on her husband's claim to gain her asylum because she had by then been lying by omission to her husband and had been doing so for a considerable time. If she could avoid telling him then this would mean that she would not have to confess her lie to him. I find her explanation for the lie that she had been assaulted whilst out with her brother-in-law and who had not been able to prevent the assault on her and had therefore begged her not to tell the appellant's husband because it was a matter of the brother-in-law's pride to be entirely plausible. I note that even when she was being given advised by her solicitor she was reluctant to say what had happened and the solicitor had been obliged to give her advice in confidence from her husband. I accept the appellant's account of how she and her family were obliged to live their lives in Afghanistan because it is consistent with the objective evidence that I have read. As a family they lived under considerable pressure. Part of the objective of the harassment that they experienced was not only to make them feel threatened but also to belittle them especially the women and children where their menfolk could not protect them. This not only assaulted the women but diminished the men in their own eyes. It is perfectly credible that the appellant would not have wanted to expose her brother in law to this and also would not have wanted to have exposed her husband to it because he no doubt would also have felt powerless to protect his wife in the circumstances in which they were living."

11. In substance, the judge's acceptance that the claimant had had valid reasons for failing to raise her own experiences before Judge Coaster demonstrate that there were valid reasons to depart from the original judge's findings.

12. Mr Mills submits that had the judge applied **Devaseelan** principles, she would have been obliged to treat the claimant's evidence "with great circumspection", and to recognise that she could not assess the claimant's credibility de novo. I have two difficulties with this submission. One difficulty is that the SSHD's grounds rely solely on the failure to apply **Devaseelan** guidelines without any particularisation as to how it is considered this had compromised the judge's assessment of credibility. If the SSHD intended to challenge the judge's positive credibility findings, that should have been identified either as a separate ground or as a particularisation of the only ground of challenge.

13. The other difficulty is that I cannot see any lack of circumspection in the judge's treatment of the claimant's evidence and the reasons why he had not mentioned her own problems at the original hearing. The fact that the judge required an explanation for this failure and only went on to accept her account because she was satisfied that the explanation was satisfactory, demonstrates that she did not, as Mr Mills submits, treat her evidence "from scratch" or de novo.

14. Mr Mills submits that even if I took the view that the judge was entitled to find the claimant's account credible, that did not justify departure from the previous judge's findings regarding the likely educational circumstances of the children if returned. Here I am in agreement with Mr Dieu. Once the judge decided to consider the new evidence presented by the claimant, she necessarily had to consider the issue of the children's educational circumstances on the basis of a new factual scenario – one in which she and the children had already met with particular problems in Kabul. At paragraphs 52-53 the judge set out the full particulars:

> "52. Whether or not the claims with regard to the appellant's children's education differ to those claims made by the appellant's husband in his appeal the fact remains on my findings above that this family had more cause for concern than was apparent when the appellant's husband's appeal was heard. This is because the anxiety for her own and her children's future safety caused to the appellant as a result of the assaults on her means that she would be more likely to avoid exposing her children to the risk presented to them of being away from their parents' direct care whilst they attended school. In addition the likelihood of the children being harassed and assaulted would be greater in the appellant's consideration because of the assaults on her. I note that the appellant herself had not been able to attend school largely because of the fear that she would be assaulted and as a result she had barely any education at all.
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> 53. Attendance at school is more than simply being afforded an education. School children learn to socialise with others, how to cope in a system where their needs are competing with those of their fellow pupils and how to function in a society. The proposal that the children should be educated in a closed home, closed because they would be too frightened to go out or at least because their parents with the knowledge of the risk that they may face outside their home would be too anxious to allow them to go outside their home, deprives the children of the opportunities that attending school presents. Of course, it could be said that the children would be able to gain the necessary experience by attending the Gurdwara but I accept the appellant's evidence as to the diminishing size of the Gurdwara and the now extremely limited ability for it to supply support to their members. Her evidence on this point is entirely consistent with the objective evidence that I have seen. In any event I am satisfied by the evidence that the appellant gave that enquiries made on her behalf and on behalf of her husband have revealed that her other family members who lived in their home in Kabul have fled and that their home is now occupied by strangers. This means that the support that the family had received from her brother-in-law is no longer available to her and her husband. It also means that there would be no money available to pay for private tutoring of the children. I accept the appellant's evidence that her husband had never worked and I am satisfied that the

> appellant and her family will not have any support in Afghanistan. I am satisfied that as an unskilled, Sikh man with no work experience in Afghanistan he is unlikely to be able find employment."

15. For the above reasons I conclude that, even though the judge erred in rejecting **Devaseelan** guidelines as having any application to the claimant's case, this error was not material as the judge's own findings and reasoning furnished valid reasons for revisiting those findings and reaching independent findings.

16. Accordingly the decision of the FtT Judge must stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 11 March 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal